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No. 5828

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. MASSAGLI, doing business as San Francisco Concrete Co., and also as San Francisco Concrete & Mosaic Works, alleged bankrupt,

Appellant,

vs.

T. I. BUTLER CO. (a corporation), J. S. GUERIN and STEPHEN I. GUERIN, copartners, doing business under the name of J. S. Guerin & Co., and GOLDEN GATE ATLAS MATERIALS CO. (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF THE CASE.

Appellees filed a petition in involuntary bankruptcy seeking to have appellant, Massagli, adjudged a bankrupt. The bankrupt moved to dismiss the petition upon the ground that it was improperly verified. The District Court denied his motion, and the bankrupt filing no answer, an order of adjudication was made. This appeal is taken from the order of adjudication, the bankrupt claiming that the denial of his motion to dismiss was error.

ARGUMENT.

We believe the petition is properly drawn and verified. It specifically and definitely apprises the alleged bankrupt of what he is called upon to meet. All things within the knowledge of the creditors are sworn to absolutely. Those details which necessarily lie within the knowledge of the debtor and not within the knowledge of the creditors, are alleged with particularity but upon information and belief. The petition is verified absolutely as to all matters alleged absolutely, and as to the matters therein stated on information and belief, the verifying affiants affirm that they believe it to be true. The pleading fully informs the bankrupt of the issues he is called upon to defend, and the verification goes as far as any conscientious and responsible litigant can properly go. Such objections to a pleading are captious.

There is no authority to support the claim of the appellant.

The bankrupt cites *Sabin v. Blake-McFall Co.*, 35 Am. B. R. 179. In that case the whole petition and all of its allegations were verified upon belief. The court says, page 184:

> "In this petition the statement must show the principal place of business of the debtor: that he owes debts to the amount of $1,000; that the petitioners are creditors having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of $500; the nature and amount of the petitioners' claims; and that the debtor had committed an act of bankruptcy within four months. This statement can be and ought to be direct and positive."

In our petition, all of these statements referred to by the court, are direct and positive.

The bankrupt cites *Matter of Bieler and Batzer,* 2 Am. B. R. (N. S.) 192. In this case also it is the whole petition and all of its allegations that are verified on information and belief.

The bankrupt cites *Matter of Seifred,* 6 Am. B. R. (N. S.) 33. This case is in our favor. The petition states:

> "We understand, believe, and allege that there are less than twelve creditors."

The Circuit Court of Appeals, affirming the District Court, holds the petition sufficient. The court says, at pages 37, 38:

> "The allegation, of course, must have been made on some understanding and belief, and the words 'understand' and 'believe' may be treated as surplusage."

The District Court whose judgment is thus affirmed (2 Am. B. R. (N. S.) 91), 293 Fed. 936, speaking through Lowell, District Judge, says, at page 92:

> "Statement of facts in an involuntary petition must usually be as of the knowledge of the petitioner. * * * This was the case in the petition under consideration, except as to the allegation of the number of creditors. There seems to be no reason why this allegation should not be made on information and belief, as it is of a fact which may not be easily susceptible of definite knowledge. A learned text writer states this to be the law (1 Black, Bankruptcy, 3d Ed., sec. 160)."

Appellant cites *In the Matter of Rodriguez Torres & Co.,* 2 Am. B. R. (N. S.) 842. This case is not in point. It does not turn upon any question of verifica-

tion, nor upon any question of pleading on information and belief. The case concerns itself entirely with the sufficiency of the allegations, whether sufficiently specific and definite or too vague and general.

In the case of *Re Blumberg,* 13 Am. B. R. 343, there is also no question of verification, nor any question of pleading upon information and belief. The question considered here also was whether the allegations were sufficiently specific. The language of the court, moreover, clearly implies that the specifications of detail of the preference charged may be made upon information and belief.

The case of *In re Gerber,* 26 Am. B. R. 608, cited by the bankrupt, holds that where a bankrupt failed to claim his statutory exemptions in the manner and within the time prescribed by the general orders and forms, he thereby waived his rights. The case has nothing to do with any question of the form or verification of the petition.

These are the cases cited by appellant. On page five of his brief, appellant states that in view of the decision of this court in the *Sabin* case, he believes it unnecessary to cite cases from other jurisdictions, thereby raising an implication that such cases can be found. We have searched the books, and fail to find in this or any other jurisdiction any case to support the contention of appellant.

In the case of *In re Vastbinder,* 11 Am. B. R. 118 (D. C., Pa., 1903), 126 Fed. 417, the petition was verified in toto by affidavit that the statements therein are true to the best of the knowledge, information, and

belief of affiants, and the court sustained a demurrer upon this ground with leave to amend the defect. The court says, at page 119:

> "The difficulty is, that the facts which are affirmed of knowledge are not distinguished from those which are based on information, thus in effect dissipating the force of the affidavit."

The petition in the case of *In re Farthing,* 29 Am. B. R. 732 (D. C., North Car., 1913), 202 Fed. 557, was verified in toto, as to all the statements of fact therein contained, upon information and belief. The petition was demurred to upon this ground and also upon the ground that certain allegations were too general and not set out with sufficient definiteness and particularity. The court says, page 738:

> "It would seem reasonable and just to apply to the petition in this respect the test by which the sufficiency of a declaration or complaint is measured in an action upon a negotiable instrument. The rule uniformly applied is that material facts should be distinctly, and not inferentially alleged. The court will not supply, by intendment, an averment which the pleader has failed to make. The facts constituting the cause of action should be set forth in the complaint with definiteness and certainty. The plaintiff, in his complaint, should apprise the defendant of the precise grounds upon which he relies. The facts may be alleged either upon plaintiff's own knowledge, or upon information and belief."

In the case of *Matter of Ball,* 19 Am. B. R. 609 (D. C., N. Y., 1907), 156 Fed. 682, the commission of the acts of bankruptcy was alleged upon information and belief, and the verification states that the facts contained in the petition are true except as to the matters stated to be alleged on information and belief,

and as to those matters, affiant believed them to be true. Both as to manner of the allegations and the form of the verification, the petition in the *Ball* case is identical with the petition under consideration. The bankrupt's demurrer was overruled. The court says, at page 611:

> "It would seem from the language of the prescribed form that a petition in involuntary bankruptcy is looked upon in the same light as a complaining affidavit in the matter of a criminal charge. The language 'your petitioners further represent that' is the statement of a conclusion and of an allegation which it is apparent must in all cases be made upon hearsay, information and knowledge derived from sources other than the actual personal knowledge of the party making the petition. The language of the verification is to the effect that the petitioners swear that the statement made by them is true. This statement is that they 'represent' or allege to the court the doing of certain things by the alleged bankrupt. The affiant swears that he charges certain acts against the bankrupt, and he implies that he has verified them so as to be willing to stand by the consequences of his charge. He is not testifying as to what he has seen or done. The verification is not equivalent to an oath that the person making the verification has actual knowledge that certain acts were done, because they occurred in the presence of the petitioner. The oath is not subject to the rules of competency with respect to hearsay testimony. On this account the insertion of the words in a petition, that it is made upon information and belief, neither add to nor detract from the strength of the allegation, and likewise in the verification the additional statement that the petitioners believe the matters which are stated to be alleged upon information

> and belief to be true, is mere surplusage, and while the language should not be used, it is no ground for dismissing the petition. The cases cited are not, in the opinion of the court, in contradiction of this view."

The court, *In re Bellah,* 8 Am. B. R. 310 (D. C., Del., 1902), 116 Fed. 69, compares bankruptcy pleading with pleadings in criminal cases, and states, at page 314:

> "It is a general rule, subject to qualification in some instances, that an indictment for a statutory offense is sufficient if it charges the defendant with the commission of acts within the statutory description, 'in the substantial words of the statute without any further expansion of the matter.'" (Citing cases.) "But 'it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'"

And the court quotes from *U. S. v. Simmons,* 96 U. S. 360, where the court, through Mr. Justice Harlan, referring to the general rule, said:

> "'But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.'"

At page 315 the court says:

> "But the qualification of the general rule, while requiring that the defendant shall be apprised with reasonable certainty of the offense charged against him, does not contemplate that mere matter of evidence not necessary for that purpose shall be spread upon the face of the indictment. * * *
>
> "Here an act of bankruptcy is charged in the language of the statute. The petition alleges that the defendant at and since a specified time 'concealed and secreted' a specified fund 'with intent to hinder, delay or defraud his creditors.' The charge is clear and specific. No room is left for doubt on the part of the defendant as to the nature and extent of the accusation."

At page 316 the court says:

> "If the defendant concealed the specified fund as alleged, it must be assumed that the details and circumstances of the concealment were within his knowledge, and no hardship can be involved in requiring him to answer and meet the charge of concealment, as made, without 'further expansion of the matter.' On the other hand, to require the petitioning creditors in such a case to set forth the details of the concealment or secretion not only would be unnecessary to the due protection of the defendant, but might, and probably would, require the performance of an impossibility. The application of such an impracticable standard of particularity would necessarily defeat all petitions in involuntary bankruptcy based on fraudulent concealment by the defendant of his property, where the evidence of such concealment is circumstantial and not direct and positive."

In the petition here under consideration, we allege the commission of the act of bankruptcy in the terms of the statute absolutely, and supply the details thereof upon information and belief.

A motion to dismiss a petition in bankruptcy was denied in *Matter of Parker*, 48 Am. B. R. 697 (D. C., Ill., 1921), 275 Fed. 868. The court says, at page 700:

> "The allegation setting forth the alleged act of bankruptcy might well be more particular and specific than the allegations of indebtedness and insolvency; but here, too, the facts are in the possession of the debtor, and reference to the transaction constituting the alleged act of bankruptcy necessarily apprises the debtor of the transaction complained of, the details of which need not be charged with greater particularity because they are known better to the debtor than to the petitioning creditors."

While it is true that the rules and forms prescribed by the Supreme Court have the force and effect of law, it is equally true that bankruptcy practice should be reasonably adapted to the accomplishment of the purposes of the Act, and the promotion of justice. The forms are directory, and they are intended to secure uniformity and simplicity of practice. They were not designed as pitfalls for the unwary, nor to create arbitrary and purposeless technicalities. General Order XXXVIII provides that the forms should be observed and used "with such alterations as may be necessary to suit the circumstances of any particular case."

In *West Co. v. Lea Brothers & Co.,* 2 Am. B. R. 463, 174 U. S. 590, the Supreme Court holds that a petition based upon an assignment for the benefit of creditors need not allege insolvency, the official form to the contrary notwithstanding. The court, speaking through Mr. Justice White, says (page 470):

> "These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case."

A motion to dismiss for want of proper verification was overruled *In re Simonson, Whiteson & Co.,* 1 Am. B. R. 197 (D. C., Ky., 1899), 92 Fed. 904, and the court refers to the rules and forms prescribed by the Supreme Court, at page 205, as follows:

> "Of course, the rules, in a general sense, are obligatory, but the practice in bankruptcy cases must be reasonably adapted to practical conditions, and the rules should be applied to promote the ends of justice, and not to the attainment merely of literal and technical exactness in formal matters."

Collier on Bankruptcy (13th Ed.), Vol. III, page 2060, sets out Official Form No. 3, Creditors' Petition. To this official form the learned authority appends the notation, "This form is demurrable."

The same author says (Vol. I, page 918):

> "The general orders are not to be taken as enlarging the statute, but must, if possible, be construed consistently with it. But the general orders are not always in tune with the law; and the forms show a want of harmony at times both with the law and the general orders."

We respectfully submit that the petition is fairly drawn and verified; that it places the bankrupt at no conceivable disadvantage; that the charges laid are authenticated as rigorously as should be required of the creditors; that the bankrupt's motion and appeal are not designed to protect any of his rights, and are without substantial merit.

Dated, San Francisco,
November 20, 1929.

Respectfully submitted,

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BYRON COLEMAN,
Attorneys for Appellees.